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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

MARC ANTHONY WHITMORE,

Defendant and Appellant.

F044295

(Super. Ct. No. F02671752-4)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. James Quaschnick, Judge. (Retired judge of the superior court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.)

James Bisnow, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, John G. McLean and Harry Joseph Colombo, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Buckley, Acting P.J., Cornell, J., and Dawson, J.

Appellant, Marc Anthony Whitmore, contends that his conviction of battery resulting in serious bodily injury must be reversed because of the court's failure to instruct on the meaning of "lawful self-defense." We will affirm.

FACTS

In May of 2002, Melinda Foster was working at the Goodwill Store when appellant, with whom she had a nondating social relationship, came in to see her. Appellant had loaned money to Ms. Foster's boyfriend. In the store, appellant stated that he had "started having feelings" for her. She told him she was busy, whereupon he spoke more loudly. She went outside to talk with him.

Outside, he continued talking in a loud voice; Ms. Foster turned to go back into the store, saying, "I can't talk to you." Appellant grabbed her, turned her around and "bit [her] lip off" and "spit it in [her] face." This left a large hole in her lip. (Appellant was acquitted of mayhem.) Appellant then told her to tell her boyfriend "to give me my money." A month later, a person she recognized as appellant telephoned her, saying "your lip was good ... bitch...." The call was recorded.

In his defense, Whitmore produced an expert who testified the voice on the phone was not that of appellant. Appellant testified the victim, while they were outside the store, began making loud statements, poked him with a pen she held, and tried to slap him with the other hand. He testified he raised his hands to block her and pushed her, causing her to stumble backwards. He testified she threatened "to get [him.]" He denied seeing any blood on her.

DISCUSSION

The sole argument on appeal is that the court erred in failing to define “sua sponte” “lawful self-defense.”¹ Appellant contends he had relied on self-defense when he testified that by “using his arms against Ms. Foster, he merely tried to shield and protect himself from her blows directed at him.”

As we shall briefly explain, this contention is meritless. We agree with respondent’s position that while a trial court must instruct on self-defense where it is supported by substantial evidence and consistent with defendant’s theory at trial (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488), there was no such duty here.²

Appellant’s argument fails on both counts. His testimony that he merely raised his hands to block Ms. Foster’s blows and pushed her back and his implicit denial of injury to her is a denial that he caused the injury claimed by her, whether in self-defense or not. Accordingly, there is no substantial evidence self-defense played a part in the injury claimed by the victim. Furthermore, instructions on self-defense would have been inconsistent with appellant’s trial theory that he did not cause the injury. (Cf. *People v. Garvin, supra*, 110 Cal.App.4th at p. 488.)

DISPOSITION

The judgment is affirmed.

¹ The court instructed with CALJIC No. 9.12 (battery with serious bodily injury). In pertinent part, the instruction stated: “[The use of physical force against the person of another is not unlawful when done in lawful [self-defense] [or] [defense of others]. The burden is on the People to prove the use of force was not in lawful [self-defense] [or] [defense of others]. If you have a reasonable doubt that such use was unlawful, you must find the defendant not guilty.]”

² Notwithstanding appellant’s specific quarrel with the undefined term “lawful self-defense,” he adds, more generally, that at least three more instructions regarding self-defense should also have been given.